Supreme Court, U.S.
FILED
DEC 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-508

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED STATES CAN COMPANY, a Georgia Corporation,
CONTINENTAL BEVERAGE PACKAGING, INC.,
a Delaware Corporation,
Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

RESPONDENTS' BRIEF IN OPPOSITION

ALLISON BECK
MARK SCHNEIDER
(Counsel of Record)
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-5250

LAURENCE GOLD
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	3
I. The Court Does Not Have Statutory Jurisdiction Over This State Court Interlocutory Decision	3
II. The Court Should Not Grant Review In This Case Because It Comes To The Court In An Undeveloped Factual Setting	10
III. The Wisconsin Supreme Court Decision Does Not Conflict With The Decision Of Any Other Court	11
IV. The Wisconsin Supreme Court's Decision Does Not Pose A Threat To Proper Mergers And Acquisitions, Or To Sound Labor Relations	13
CONCLUSION	15

TABLE OF AUTHORITIES

CASES — Page

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) ..... *passim*
Belknap Inc. v. Hale, 463 U.S. 491 (1983) 3, 8, 9
Brotherhood of Railway Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 12
Caterpillar v. Williams, 482 U.S. 386 (1987) 14
Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502 (1962) 7
Chicago & N. W. R. Co. v. Transportation Union, 402 U.S. 570 (1971) 12
Chrysler Corp. v. Smolarek, cert. denied, (Dec. 1, 1989) 14
Construction Laborers v. Curry, 371 U.S. 542 (1963) 9
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 4, 8
Deford v. Soo Line R.R., 867 F.2d 1080 (8th Cir.), *cert. denied*, 109 S.Ct. 3265 (1989) 11-12, 13
Electrical Workers v. Hechler, 481 U.S. 851 (1987) 14
Flynt v. Ohio, 451 U.S. 619 (1981) 7
Gibson v. AT&T Technologies, 782 F.2d 686 (7th Cir.), *cert. denied*, 977 U.S. 905 (1986) 13
Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 3158 (1989) 13
Jones v. Truck Drivers Local No. 299, cert. denied, 58 U.S.L.W. 3319 (Nov. 10, 1989) 14
Lingle v. Norge Division of Magic Chef, Inc., 108 S.Ct. 1877 (1988) 6, 10
Marositz v. Boilermakers, cert. denied, 58 U.S.L.W. 3201 (Oct. 2, 1989) 14
Miami Herald Publication Co. v. Tornillo, 418 U.S. 241 (1974) 8
North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 8
Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie Ry. Co., 858 F.2d 536 (1988) 12

TABLE OF AUTHORITIES—Continued

Page

Roberts v. Sun Exploration And Production Co., cert. denied, 58 U.S.L.W. 3201 (Oct. 2, 1989) 14
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 6, 7
Terwilliger v. Greyhound Lines, Inc., 882 F.2d 1033 (6th Cir. 1989) 13
Wilkinson v. Safeway Stores, Inc., cert. denied (Dec. 1, 1989) 14

STATUTES

Interstate Commerce Act, 49 U.S.C. § 10501 11
Labor Managements Relations Act, 29 U.S.C. § 185(a) ..... *passim*
Railway Labor Act, 45 U.S.C. § 153 11-12
28 U.S.C. § 1257 3
Wisconsin Uniform Fraudulent Transfer Act, Wis. Stat. § 242 *et seq.* ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-508

UNITED STATES CAN COMPANY, a Georgia Corporation,
CONTINENTAL BEVERAGE PACKAGING, INC.,
a Delaware Corporation,
Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves a challenge by the respondents unions (on their own behalf and on behalf of the employees they represent) to the leveraged buyout of their members' employer, petitioner general packaging division of Continental Can Company, by petitioner United States Can Company. Respondents brought suit against petitioners in state trial court in Wisconsin under the state's Uniform Fraudulent Transfer Act, Wis. Stat. § 242 *et seq.* ("UFTA") which provides that every conveyance of any type, made without fair consideration, that (1) renders

a person insolvent, or (2) leaves a person undercapitalized, or (3) was made with the intent of defrauding another person, is fraudulent as to any of that person's creditors. The law is one of general application, having nothing to do with labor-management relations, or labor contracts, except incidentally as such a contract may make someone a creditor. The respondents asserted standing to sue under the UFTA as representatives of employees, creditors of Continental Can by virtue of their employee status as defined in their collective bargaining agreement. Respondents also asserted standing as creditors by virtue of the dues check off to which they were entitled as collective bargaining representatives.

The complaint alleged three different violations of the state UFTA, tracking the three provisions of that statute. The first claim is that the buyout would render one or more of the petitioners insolvent. The second claim is that the buyout would leave one or more of the petitioners with "unreasonably small capital," and the third is that the transaction was entered into intentionally "to hinder, delay or defraud" creditors.

Shortly after discovery in the matter began the trial court granted petitioners' motion to dismiss the complaint on labor pre-emption grounds. In particular, that court ruled that § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), strips state courts of all jurisdiction to address any claim that is in any way related to a right created by a collective bargaining agreement. The trial court then assumed that respondents' claims were based on the labor agreement between the unions and Continental Can, apparently because that agreement established the rates of pay (and dues check off) due to respondents. Pet. 43A.

Respondents appealed the decision granting the motion to dismiss to the state intermediate appellate court, which certified the matter to the state supreme court. Pet. 2A. The Wisconsin Supreme Court, in a carefully reasoned

opinion which derived the applicable legal standards from this Court's recent decisions in this area, determined that in its "present state-claim posture" the dispute is not pre-empted, and accordingly remanded for further proceedings. Pet. 21A. In the meanwhile, the leveraged buy-out took place, the new entity continued in operation, and the respondent unions continued to represent the bargaining unit employees.

ARGUMENT

This Court does not have statutory jurisdiction over the state court interlocutory decision the petitioners challenge here. Pp. 3-9, *infra*. Even if there were jurisdiction, the Court should deny the writ because the labor pre-emption question raised is one that is governed by a body of this Court's decisional law that now requires elaboration in developed factual settings, and this proceeding was truncated by a dismissal before trial and, indeed, before discovery had begun in earnest. Pp. 10-11, *infra*. And, while the petitioners claim otherwise, the decision below does not create a conflict with the decision of any other court nor has it served to unsettle corporate merger and acquisition transactions. Pp. 11-14, *infra*. In sum, this case does not warrant this Court's plenary consideration at this time.

I. The Court Does Not Have Statutory Jurisdiction Over This State Court Interlocutory Decision.

This Court's *certiorari* jurisdiction over state court judgments is limited to "[f]inal judgments or decrees rendered by the highest court of a State." 28 U.S.C. § 1257. This case is here in an interlocutory setting, the order under review having sent the case back to the trial court for discovery and trial. There has been no final determination of any rights; indeed, the trial process was truncated by the grant of a motion to dismiss shortly

after discovery began. And as we now show, this case does *not* fall within any of the four recognized narrowly defined exceptions to the final judgment rule recognized by this Court, *e.g.*, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-487 (1975).

Petitioners assert that this case is final for the same reason that *Belknap v. Hale*, 463 U.S. 491, 497-498 n.5 (1983), was deemed to be final. *Belknap* was determined to fall within the fourth exception to the finalty rule elucidated in *Cox*; as petitioners' jurisdictional argument indicates, only that exception can be said to provide even arguable support for the Court's jurisdiction in this case. We therefore turn to the question of whether this case is, indeed, within that exception (and treat the other possibilities only in the margin).[1]

In cases falling within the fourth *Cox* exception, the Court has asserted jurisdiction over interlocutory decisions in which *all* of the following factors are present: (1) the federal issues have been finally decided; (2) reversal of the state court on the federal issue would resolve the litigation; and (3) "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 804. Far from satisfying all three of these requirements, this case in its pres-

---

[1] The first category consists of cases in which as a practical matter any resolution of the federal question would completely resolve the case. Here, assuming that the federal question is resolved in favor of respondents, they still would have to prevail on the merits of their claims in order to obtain a judgment. The second consists of cases in which the same federal issue will remain regardless of the outcome of future state court proceedings. Here, if petitioners prevail on the merits, the pre-emption claim will drop out of the suit. And the third category consists of cases in which the interlocutory setting presents the only opportunity to review the federal issue. Here, the federal pre-emption issue will remain a live appeal issue should respondents prevail.

ent posture satisfies none of them. We will address the factors in turn.

1. This is not a case in which there is a single federal issue that can be finally decided at the threshold. The trial court dismissed the complaint at the beginning of the law suit, before any defense other than the particular federal pre-emption defense at issue could be raised and addressed. In its present footing it is far from clear what the contested issues will be at trial. One thing, however, is clear: regardless how this Court would resolve the question presented in this petition, federal pre-emption questions will remain in this case.

Thus, if this Court were to grant the writ, affirm the Wisconsin court's judgment, and the matter were to be sent back to trial, at least three federal pre-emption issues could foreseeably arise.

First, the very LMRA § 301 pre-emption issue decided by this Court could recur. The Court has made clear that § 301 pre-empts only those claims whose resolution is "substantially dependent upon analysis of the terms of [a labor] agreement." *Allis-Chalmers v. Lueck*, 471 U.S. 202, 220 (1985). The determining factor is not the conflicting labels the parties may attach to a claim, but the substance of the claim, and in particular the substance of the analysis required of the trial court to resolve the claim. *Id.* at 211, 219.[2]

---

[2] *Allis-Chalmers*, of course, came to this Court in an interlocutory setting. The trial court, there, however, unlike the trial court here, had ruled that the plaintiffs' claim had to be treated as an LMRA § 301 claim, and as such had to be dismissed for failure to exhaust the arbitral remedy available under the contract. *See* 471 U.S. at 207. Thus it may have appeared, given the setting of the case and the novelty at that time of this branch of the labor pre-emption doctrine, that all federal issues had been finally resolved. In any event, in that case neither respondent nor any other party argued to the Court that it lacked jurisdiction over the case; the jurisdictional issue was neither briefed, argued, nor discussed in the Court's opinion.

Not surprisingly, then, the judgment under review is grounded on the Wisconsin court's determination that, *in this case's current posture*, it does not appear that federal contract interpretation questions would play any substantial role at trial, and that the trial court's decision at this stage was therefore error. Such a case-specific, practical determination, however, does not—indeed cannot—finally resolve the § 301 issue, for trials sometimes turn out quite differently than anticipated. And certainly nothing in the Wisconsin court's order would prevent petitioners from reintroducing the same pre-emption claim raised here should it come to pass that the state court's assumptions about the course of the trial provided inaccurate. The issue is still a live one.

Second, even assuming that the Wisconsin court's sensible prediction proves accurate, and federal labor law issues play only a minor and incidental role at the trial, a federal question nevertheless will be presented the few times the labor agreement becomes an issue, as the Wisconsin court itself recognized. *See* Pet. 13A. *See also Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877, 1885 n.12 (1988) (section 301 mandates that federal law would govern incidental questions of contract interpretation that might arise in the course of deciding any state law claim). Thus residual issues of federal contract interpretation remain in the litigation.

Third, plaintiffs' third cause of action, that the leveraged buyout was part of a fraudulent scheme to deprive them the benefit of their labor contract, raises unaddressed labor pre-emption questions under the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Indeed, defendants raised *Garmon* pre-emption issues before the intermediate appellate court as an alternate ground in support of the trial court's ruling, and on remand those issues could well be before the state courts again.

Even a reversal by this Court would not necessarily resolve all federal questions in this litigation. LMRA § 301 is a jurisdictional statute that, when it applies, deprives state courts of jurisdiction over certain state law claims, *not* over suits that were or could be pleaded as federal contract claims. The state trial court's ruling that the respondents' claims were pre-empted, and, as a result, this suit had to be dismissed for want of state court jurisdiction, is doubly wrong.

Petitioners' pre-emption argument rests on the proposition that any claims respondents may have are, of necessity, § 301 claims, and not that respondents have no valid claims. And *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), holds that state courts *do* have jurisdiction over § 301 claims. Accordingly, even if the Wisconsin Supreme Court erred in its pre-emption ruling—and it did not—this action would have to be remanded to the state trial court to be resolved as a § 301 suit. *See Allis-Chalmers*, 471 U.S. at 220-221. At that point the federal question will arise how the motion to dismiss should properly be resolved under federal law.[3] And that federal question has not yet even been considered by the state courts.

The existence of these unresolved labor pre-emption issues render the Wisconsin court's judgment not final. *See Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (judgment

[3] Were this suit treated as a § 301 suit, petitioners presumably would argue that it should be dismissed either for failure to exhaust the grievance procedure established in the labor agreement or on the ground that no contract violation had occurred. The question whether disputes of this nature were intended by the parties to the labor agreement to be subject to arbitration, and, if not, the question of petitioners' obligations under the agreement, however, are federal questions whose resolution depends upon the terms of the labor agreement and the federal characterization of the claim. Those issues have not yet been litigated, and it is far from clear how this suit should be treated on the unlikely assumption that the claims should have been treated as section 301 claims.

not final where "other federal issues will be involved in the trial court").

In sum, contrary to petitioners' jurisdictional argument, the posture of this case is in stark contrast to the posture of *Belknap, Inc. v. Hale, supra.* *See* Pet. at 2. The *sole* federal pre-emption claim in that case was the *Garmon* pre-emption claim that the case belonged before the National Labor Relations Board, and not a state court. A ruling that the suit was not pre-empted (which eventuated) would leave no federal issues in the case. A ruling that the claims were pre-empted would require dismissal of the case. Thus, the Court's ruling there—unlike any possible ruling in this case—finally determined all foreseeable federal issues in the case.

2. Nor, as *Cox* requires, would a reversal by this Court necessarily resolve this litigation. As discussed above, were the Court to grant the writ and reverse the Wisconsin court, this case would be returned to the trial court, which would be required to treat it as one brought under LMRA § 301. One of the principal purposes behind the finality requirement is to avoid piecemeal review of state court judgments. *See North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 160 (1973). Petitioners' suggestion that the Court has jurisdiction over this case cannot be reconciled with that purpose.

3. Finally, allowing this suit to proceed poses no substantial risk that federal policy wil be eroded. Virtually all of the cases deemed final under the fourth *Cox* factor involve allegations of irreparable harm to a federally-protected right. *See, e.g., Cox; Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In such a case, the delay occasioned by allowing the matter to be fully litigated in the state courts before this Court addresses the federal claim would seriously undermine the federal principle whose vindication is sought. Here, in contrast, petitioners face no risk of irreparable harm of any kind—let alone

harm to a federally protected interest—should this suit proceed. The buyout that led to the litigation has taken place, the business is in operation, and the employees represented by the respondent union are continuing to do their jobs. By being required to wait until a final judgment is reached before they seek federal review, petitioners suffer only the harm that is suffered by any losing party to an interlocutory decision.

In this regard as well this case is different than *Belknap v. Hale*, and the case upon which the Court in *Belknap* particularly relied in asserting jurisdiction, *Construction Laborers v. Curry*, 371 U.S. 542, 553 (1963). Those cases involved a *Garmon* labor pre-emption claim that, when it applies, functions to *strip state courts of all jurisdiction over a controversy*, because federal law requires that the National Labor Relations Board have primary jurisdiction over certain labor disputes. In such a situation, "to permit the proceedings to go forward in the state court without resolving the pre-emption issue would involve a serious risk of eroding the federal statutory policy of requiring the subject matter of respondents' cause to be heard by the . . . Board, not by the state courts." *Belknap*, at 497 n.5 (citation omitted).

Here, in contrast, the issue is not which forum has the power to hear the matter, but whether state or federal law applies. Assuming what is plainly not the case, that petitioners' pre-emption claim has merit, the state court has the same jurisdiction as a federal court to resolve respondents' LMRA § 301 claim. Allowing the action to proceed poses no threat to any court's jurisdiction or to the Labor Board's primary jurisdiction. No federal interest will be compromised by the Court's decision to allow this matter to be finally resolved by the state system before considering petitioners' federal claim.

II. The Court Should Not Grant Review In This Case Because It Comes To The Court In An Undeveloped Factual Setting.

Even if we are wrong and the Court were ultimately to determine that there is jurisdiction over this matter, the foregoing is more than sufficient to demonstrate that the Court's jurisdiction is problematic. And the critical consideration in that regard—the interlocutory nature of the case—serves also to show that this case does not warrant this Court's plenary review at this time. For the truncated proceedings thus far do not provide the Court the concrete factual setting necessary for the elaboration of a legal principle that the Court has recognized must "be fleshed out on a case-by-case basis." *Allis-Chalmers*, 471 U.S. at 220.

There has been no trial here, indeed there has been virtually no discovery. As a result, the Wisconsin court's analysis of the nature of the claims before it was inevitably conjectural to a certain extent. Given the setting of the case, it is impossible to determine with certainty what respondents will have to prove to make out their claims, and therefore to what extent these claims involve interpretation of a collective bargaining agreement or other considerations of federal labor policy. Under this Court's decisions from *Allis-Chalmers* through *Lingle*, these are the factors that govern in deciding LMRA § 301 pre-emption claims. This case is far too undeveloped to serve as a vehicle for further refinement of the present doctrine.

Similarly, another question posed by the petition—whether all claims involving rights that derive from an employment relationship whose terms have been set in a collective bargaining agreement should automatically be pre-empted—is not one that should be answered in the abstract. Respondents believe that as this litigation proceeds it will become manifest that federal issues con-

cerning the labor agreement will be merely one of many background, collateral, issues the trial court will consider in rendering judgment, and that labor contract interpretation will play no conclusive role in this trial. Petitioners, of course, insist that because the employees' status as creditors derives from the fact of their employment relationship, somehow the federal policy of uniformity of contract interpretation requires pre-emption. To the extent that the petitioners' position has any merit at all, the Court will be in a far better position to consider it after a full trial on the merits. Any judgment by the court at this time will be necessarily grounded in part on speculation about the course of a trial that has not yet taken place.

In an area such as LMRA § 301 pre-emption that the Court has already determined calls for case-by-case determinations, it seems most sensible to await completed cases. The basic rules governing resolution of such claims have been set, and what is required now is elaboration of those rules in the context of concrete factual settings.

III. The Wisconsin Supreme Court Decision Does Not Conflict With The Decision Of Any Other Court.

There is no conflict among the courts that could warrant a grant of this case in its interlocutory setting. The Wisconsin Supreme Court's decision is a case of first impression under LMRA § 301. The one case to which petitioners refer in text as being in tension with this one is *not* an LMRA § 301 case. *See* Pet. at 11-13 (citing and discussing *Deford v. Soo Line R.R.*, 867 F.2d 1080 (8th Cir.), *cert. denied*, 109 S.Ct. 3265 (1989)).

Deford held that a state law claim under the Minnesota Uniform Fraudulent Transfer Act was properly removed to federal court because of the pre-emptive force of the Interstate Commerce Act, 49 U.S.C. § 10501(d), and of the Railway Labor Act, 45 U.S.C. § 153, ("RLA") which mandates that so-called minor disputes be resolved

by arbitration through the National Railway Adjustment Board.[4]

Here the Interstate Commerce Act does *not* apply at all; to the extent Deford's claims were pre-empted by the ICA, the case is wholly inapposite. Nor does *Deford*'s RLA holding create a square conflict, for it is far from clear that the pre-emptive effect of LMRA § 301 is identical to the pre-emptive effect of RLA § 3, and only on the premise that there is such an identity is there a conflict. Indeed, this Court has warned repeatedly that the federal common law of the Railway Labor Act may not be assumed to apply automatically to analogous provisions under the National Labor Relations Act. *See Chicago & N.W.R. Co. v. Transportation Union*, 402 U.S. 570, 579 n.11 (1971) ("all parallels between the NLRA and the Railway Labor Act [] should be drawn with the utmost care and with full awareness of the differences between the statutory schemes"); *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-384 (1969).

RLA § 3 calls for mandatory adjustment of grievances by an arbitral board, reflecting Congress' judgment that all minor disputes must be resolved in binding arbitration. The NLRA and the LMRA take a very different approach to contract disputes, mandating only a federal preference for whatever grievance resolution system the parties adopt. It is perfectly rational to suppose that pre-emptive effect of the provision of the RLA calling for binding arbitration of disputes accordingly is greater than the pre-emptive effect of the LMRA provision calling for a federal law of labor contract interpretation.[5]

---

[4] *Deford's* Railway Labor Act holding squarely conflicts with the earlier decision by the Third Circuit in *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie Ry. Co.*, 858 F.2d 536 (1988). This Court recently denied *certiorari* in *Deford*. No. 88-1824 (July 3, 1989).

[5] In a footnoted string citation, petitioners assert that "at least" three other United States Courts of Appeals disagree with the

IV. The Wisconsin Supreme Court's Decision Does Not Pose A Threat To Proper Mergers And Acquisitions, Or To Sound Labor Relations.

Petitioners argue finally that the decision below must be reviewed immediately because the ruling as applied to challenges to leveraged buyouts in particular threatens to wreak havoc upon this increasingly common form of commercial transaction. Pet. at 14. But petitioners point to *no* buyouts that have been thwarted by similar court actions. Indeed, petitioners point to *only one other case* in which a similar challenge to a leveraged buyout even has been raised. *See Deford, supra.* There is no merit to the suggestion that leveraged buyout labor pre-emption law is in a state of confusion or that corporations are facing burgeoning conflicting court decisions across the country on this issue.

---

analysis of the Wisconsin Supreme Court. Pet. at 12 & n.7. All of these cases, however, involve fact patterns distinct from the facts of this case; indeed, to the extent the cases present similar LMRA § 301 questions, the decisions are entirely consistent with the holding of the court here. All of the claims ruled pre-empted were completely dependent on the interpretation of a collective bargaining agreement: the state claim succeeded or failed depending upon how the bargaining agreement was understood. In the cases that were not pre-empted, as in the instant case, the meaning of the collective bargaining agreement was either irrelevant to the outcome of the suit, or was merely one background fact among many that the court had to consider in resolving the suit. The outcome of the suit did *not* turn on the meaning of the labor contract.

See Terwilliger v. Greyhound Lines, Inc., 882 F.2d 1033 (6th Cir. 1989) (claim that employer violated rehire and disability provisions of labor agreement pre-empted even though claim pleaded in fraud rather than contract); *Gibson v. AT&T Technologies*, 782 686 (7th Cir.) (claim for layoff allowance under labor contract pre-empted even though claim pleaded in tort rather than contract) *cert. denied*, 477 U.S. 905 (1986); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 118 (1st Cir. 1988) (state law privacy claim pre-empted when substance of claim "is inseparable from an interpretation of what is or is not 'reasonable' under the labor contract"), *cert. denied*, 109 S.Ct. 3158 (1989).

Far more to the point, this Court has considered the pre-emptive scope of LMRA § 301 four times in as many years.[6] The state and federal courts now addressing § 301 pre-emption claims are occupied in developing the kind of case-specific jurisprudence called for in those decisions. This Court, it appears, has therefore concluded that at this stage a further process of litigating elucidation in the lower courts would be beneficial: within the last six months it has denied the writ in at least five cases raising § 301 pre-emption claims in a variety of different factual settings.[7] Nothing about this case—presenting such a § 301 claim in yet another differential factual context and on an undeveloped record—suggests that it should be treated differently.

---

[6] *See Allis Chalmers, supra*; *Electrical Workers v. Hechler*, 481 U.S. 851 (1987); *Caterpillar v. Williams*, 482 U.S. 386 (1987); *Lingle, supra.*

[7] No. 88-2033, *Roberts v. Sun Exploration and Production Co.* (employee discharge claim pre-empted), *cert. denied*, 58 U.S.L.W. 3201 (Oct. 2, 1989); No. 88-1902, *Marositz v. Boilermakers* (tortious interference with contractual relations claim brought by one union against another should be treated as a § 301 claim), *cert. denied*, 58 U.S.L.W. 3201 (Oct. 2, 1989); No. 89-290, *Jones v. Truck Drivers Local No. 299* (state law sex discrimination claim against union pre-empted), *cert. denied*, 58 U.S.L.W. 3319 (Nov. 10, 1989); No. 89-568, *Chrysler Corp. v. Smolarek* (state law handicap discrimination claim not pre-empted), *cert. denied* (Dec. 1, 1989); No. 89-590, *Wilkinson v. Safeway Stores, Inc.* (wrongful discharge against public policy claim pre-empted), *cert. denied* (Dec. 1, 1989).

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be denied.

Respectfully submitted,

ALLISON BECK
MARK SCHNEIDER
(Counsel of Record)
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-5250

LAURENCE GOLD
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
Attorneys for Respondents